

## **STATEMENT OF AFFORDABLE DWELLING UNIT COVENANT PROVISIONS**

### **BACKGROUND:**

1. On December 11, 1989, the Board of Supervisors of Fairfax County, Virginia established an Affordable Dwelling Unit Program, as amended and modified on March 30, 1998, and as further amended and modified on July 1, 2002 ("Program"), to assist in providing affordable housing for persons with low and moderate income.
2. The Program is intended to be administered in accordance with Part 8, Article 2 of the Fairfax County Zoning Ordinance and the regulations established with respect thereto (that ordinance, together with those regulations, as the same may be amended from time to time, are collectively referred to hereinafter as the "Ordinance").
3. The Ordinance requires, in pertinent part, that owners of certain land zoned to certain zoning districts and to be developed into fifty or more residential units shall provide a number of affordable dwelling units (collectively, the "Affordable Dwellings", each individually referred to as an "Affordable Dwelling") for sale to qualified purchasers, all in accordance with and under the conditions set forth in the Ordinance.
4. The Declarant ("Declarant") under the Declaration of Affordable Dwelling Unit Covenants previously recorded with respect to the Property herein conveyed ("Declaration") has agreed that in consideration of benefits conferred upon Declarant under the Ordinance and in compliance with Declarant's obligations under the Program, the Property, together with all improvements thereon (such Property and improvements may be referred to herein as an "ADU"), shall be designated as an Affordable Dwelling in compliance with the Ordinance.
5. The Ordinance establishes certain conditions, limitations and controls on the Affordable Dwellings that are to remain in effect with regard to resale and occupancy of each of the Affordable Dwellings for a period (the "Initial Resale Control Period") beginning on the date the deed of conveyance from Declarant to the first purchaser of each of the Affordable Dwellings is recorded until fifteen (15) years thereafter; except that, for Affordable Dwellings for which the initial sale occurred prior to March 31, 1998, the Initial Resale Control Period is for a period beginning on the date the deed of conveyance from Declarant to the first purchaser of each of such Affordable Dwelling is recorded until fifty (50) years thereafter, unless the applicable Declaration has been amended, as provided for by the Ordinance, by a recorded amendment that has revised the Initial Resale Control Period to be the fifteen (15) year period described above. In addition the Ordinance establishes certain requirements applicable during the period (the "Extended Control Period") beginning upon expiration of the Initial Resale Control Period until the first resale of each of the Affordable Dwellings after expiration of the Initial Resale Control Period, which requirements establish procedures with regard to the right of the Fairfax County Redevelopment and Housing Authority ("Authority") to acquire each of the Affordable Dwellings and the payment of contributions of a portion of the proceeds from

the sale of each Affordable Dwelling to the Fairfax County Housing Trust Fund. (The Initial Resale Control Period and the Extended Control Period shall be herein collectively referred to as the "Control Periods".)

6. The Ordinance further provides that with regard to each of the Affordable Dwellings, covenants shall be recorded that will run with the land in favor of the Authority for the Control Periods specifying certain terms and conditions of the Program applicable to each of the Affordable Dwellings.

7. This Statement of Affordable Dwelling Unit Covenant Provisions ("Statement of Covenant Provisions") states the Affordable Dwelling Unit Covenants applicable to the affordable dwelling unit (ADU) being conveyed, as provided for by the terms of the previously recorded Declaration of Affordable Dwelling Unit Covenants applicable to the ADU and by the provisions of Part 8, Article 2 of the Fairfax County Zoning Ordinance.

Among other things, that Declaration provides that during the Control Periods (as defined therein) the ADU shall be subject to all the provisions of Part 8, Article 2 of the Fairfax County Zoning Ordinance and the regulations established with respect thereto, as such ordinance and regulations may be amended from time to time. Effective July 2, 2002, Part 8, Article 2 of the Fairfax County Zoning Ordinance was amended including certain changes to the provisions applicable to the ADU.

This Statement of Covenant Provisions restates and revises the provisions of the previously recorded Declaration in order to include as applicable covenant provisions those provisions set forth in Sections 2-812(2)(F) and 2-812(8)(B) of the Fairfax County Zoning Ordinance (Zoning Ordinance), as amended effective July 2, 2002, as provided for by Section 2-812(10) of the Zoning Ordinance, as amended effective July 2, 2002.

Section 2-812(10) of the Zoning Ordinance specifically provides that the provisions of Sections 2-812(2)(F) and 2-812(8)(B) of the Zoning Ordinance shall apply and the applicable covenants shall be deemed to incorporate such provisions, whether or not expressly set forth in such covenants, to any individual affordable dwelling unit initially conveyed on or after July 2, 2002, and the resale of any affordable dwelling unit conveyed on or after July 2, 2002, regardless of whether the covenants applicable to any such initial conveyance or resale conveyance were recorded prior to July 2, 2002.

8. Pursuant to the Declaration the ADU shall be subject to the covenants set forth therein and as provided for by the Zoning Ordinance as amended from time to time ("Covenants") which shall be binding in accordance with the terms therein on Declarant and all Transferees of the ADU until expiration of the applicable Control Periods. For purposes therein, Transferees shall be deemed all persons and entities that may hereafter acquire any interest whatsoever in any of the ADU, or any part thereof, from Declarant, or any successor or assign of Declarant, or any other party, whether by sale, lease, assignment, hypothecation or any other means of transfer (any and all of the foregoing means of transfer being herein referred to as a "Transfer"), for the applicable Control Periods.

#### ORDINANCE CONTROLS:

A. During the Initial Resale Control Period, no Transfer of the ADU, or any part thereof, shall be made at a sales price in excess of the maximum sales price permitted pursuant to Section 2-812 of the Ordinance.

B. During the Initial Resale Control Period, no Transfer of the ADU, or any part thereof, shall be made except in compliance with all other requirements of the Ordinance, including, without limitation, the obligation to offer the ADU exclusively through the Authority for sixty (60) days each time any ADU is offered for sale, and the Authority shall have waived its option to acquire the ADU or the time period with respect thereto shall have expired, before offering such ADU for resale to any other party.

C. For the initial sale of the ADU after expiration of the Initial Resale Control Period with respect thereto (the "First Applicable ADU Resale"), it shall first be offered exclusively to the Authority for sixty (60) days. To the extent the net sales price paid by the purchaser of the First Applicable ADU Resale, whether such purchaser is the Authority or another party if the Authority does not exercise its right to purchase after the Initial Resale Control Period as provided herein, exceeds the purchase price therefor paid by the immediate prior purchaser thereof, as such purchase price shall have been adjusted in accordance with the Ordinance, one-half (1/2) of such excess shall be contributed at the time of closing on the First Applicable ADU Resale to the Fairfax County Housing Trust Fund with the balance of such excess made available to the ADU seller.

D. During the Control Periods, the ADU shall be subject to all provisions of the Ordinance.

E. During the Control Periods, the Declaration and the Covenants shall be senior to all instruments securing financing with respect to an ADU, and the Declaration and these Covenants shall be binding upon all assignees, mortgagees, purchasers and other successors in interest, except that the Declaration and the Covenants shall be released in the event of foreclosure by an Eligible Lender, as such term is defined in the next sentence, as and only to the extent provided for in Section 2-812(8)(B) of the Ordinance. An Eligible Lender is defined as an institutional lender holding a first priority purchase money deed of trust on the ADU or a refinancing of such institutionally financed purchase money deed of trust by an institutional lender, provided that such refinancing does not exceed the outstanding principal balance of the existing purchase money first trust indebtedness on the ADU at the time of refinancing.

F. During the Control Periods, every Eligible Lender and every other lender secured by the ADU or other parties who have or may seek to place a lien on the ADU shall provide the County Executive and the Authority written notice of any delinquency or other event of default under the deed of trust or mortgage, or other instrument or agreement that may permit a lien to be filed against the ADU, and shall offer the Authority the right to cure such delinquency or other event of default within a period of ninety (90) days immediately after receipt by the Authority of such notice, and all financing documents with respect to the ADU shall so provide.

G. During the Control Periods, no sale, transfer or foreclosure of the ADU shall affect the validity of the Declaration and the Covenants, except as expressly set forth in the provisions of the Program as set forth in the Ordinance.

H. During the Control Periods, each Eligible Lender and any other lender secured by an interest in the ADU, prior to foreclosure upon the ADU, shall provide the County Executive and the Authority at least ninety (90) days prior written notice thereof.

I. During the Control Periods, the financing of the ADU shall comply with all of the provisions of Section 2-812(8)(B) of the Ordinance as they may be amended from time to time. In addition to the provisions stated above, during the Control Periods the ADU is subject to, and shall also comply with, the following in accordance with Section 2-812(8)(B) of the Ordinance:

1. The total aggregate amount of principal and accrued interest for all financing secured by the ADU shall not exceed the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance). Any financing in excess of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance) shall not be secured by any interest in the applicable ADU.

2. An Eligible Lender shall have the right to foreclose on the ADU and the Declaration and the Covenants on the ADU shall terminate upon such foreclosure by the Eligible Lender in the event that the ADU is sold by a trustee on behalf of the Eligible Lender to a bonafide purchaser for value at a foreclosure sale and all the requirements of the Program as set forth in the Ordinance, the Declaration and the Covenants, and applicable regulations with respect to such foreclosure sale are satisfied. Such requirements include, but are not limited to, the Eligible Lender with respect to an ADU having provided the County Executive and the Authority written notice of the foreclosure sale proposed and having provided the Right to Cure and the Right to Acquire, as such terms are defined below.

3. Each Eligible Lender with respect to the ADU shall also provide a right to cure any delinquency or default subject to the foreclosure notice given to the County Executive and the Authority as provided in Section F above ("Right to Cure"), and a right to acquire an ADU subject to the foreclosure notice given to the County Executive and the Authority as provided in Section H above ("Right to Acquire"). The Right to Cure and/or the Right to Acquire, as applicable, may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such ninety (90) day period after the Authority has received notice of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale. The ADU so acquired shall be acquired for the purpose of resale of such ADU to persons qualified under the Program and not for conversion of the ADU to a rental unit. The Right to Acquire shall entitle the Authority or the nonprofit agency designated by the County Executive to acquire the ADU at or before any foreclosure sale for which such notice has been given upon payment in full of the outstanding indebtedness on the ADU owed to the Eligible Lender including principal, interest, and fees that together in the aggregate do not exceed the amount of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance), and other reasonable and customary costs and expenses (the "Outstanding First Trust Debt"), and no owner, prior owner or other party, whether secured or not, shall have any rights to compensation under such circumstances.

4. In the event that neither the Authority nor the nonprofit agency designated by the County Executive exercises the Right to Acquire and the ADU is sold for an amount greater than the Outstanding First Trust Debt, one-half (1/2) of the amount in excess of the Outstanding First Trust

Debt shall be paid to the Fairfax County Housing Trust Fund to promote housing affordability in Fairfax County as part of the disbursement of settlement proceeds.

5. All financing documents for financing secured by an ADU shall state that the Eligible Lender's financing provides the Right to Cure and Right to Acquire which may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such ninety (90) day period after the Authority has received notice, as applicable, of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale.

J. During the Extended Control Period, no Transfer of any of the ADU, or any part thereof, shall be made unless the Authority shall have been given the exclusive right to acquire the ADU in accordance with Section 2-812(5) of the Ordinance.

#### PRINCIPAL DOMICILE REQUIREMENTS:

Any Transferee of the ADU, except for the Authority and any nonprofit housing development agencies or corporations approved expressly in writing by the County Executive, must occupy the ADU as such Transferee's principal domicile, and must not lease or rent or permit exclusive occupancy of the ADU to any other party or parties. Each year on or within thirty (30) days prior to June 1, the owner of the ADU shall submit to the Authority, without notice or demand therefor, an affidavit executed by such owner, on form designated by the Authority, certifying such owner's continuing occupancy of the ADU.

#### DEED AND CONTRACT RESTRICTIONS:

During the Control Periods, at the time of the sale of the ADU the owner/applicant shall provide in the sales contract for the ADU offered for sale a copy of the recorded Declaration and the Covenants running with the land in favor of the Authority. During the Control Periods, the owner/applicant shall include in the deed for each ADU sold an express statement that the ADU is subject to the terms and conditions of the Program Declaration and the Covenants recorded pursuant to the Ordinance with a specific reference to the deed book and page where such Declaration and Covenants are recorded. During the Control Periods, at the time of any sale of the ADU, the owner/applicant shall also include in the deed for the ADU sold an express statement that the total aggregate amount of indebtedness that may be secured by the ADU is limited and that other terms and conditions apply, including, but not limited to, a right for the Authority or a nonprofit agency designated by the County Executive to acquire the ADU on certain terms in the event of a pending foreclosure sale, all as set forth in the Declaration and these Covenants and/or in the Program set forth in the Fairfax County Zoning Ordinance, as it may be amended.

#### ASSIGNMENT OF RIGHTS TO AUTHORITY:

Declarant, and Declarant's heirs, successors and assigns, hereby irrevocably assigns, transfers and conveys to the Authority, and any successors thereto, all right, title and interest to enforce and maintain in full force and effect, the terms, conditions, and requirements of the Covenants.

#### RIGHT TO ENFORCE:

If the Authority shall determine that any default has occurred under the Covenants, the Authority, or its successors, may enforce the Covenants by proceeding at law, or in equity, against the persons or entities violating or attempting to violate any of the Covenants, either to restrain any violation hereof or to recover damages, including attorneys' fees and the costs of collection, or to proceed against the applicable ADU in the enforcement of any lien or obligation created by or resulting from the Covenants as allowed under Section 2-817 of the Ordinance. No remedy conferred upon or reserved to the Authority by the Covenants is intended to be exclusive of any other available remedy or remedies, but each and every such remedy is cumulative and in addition to every other remedy given under the Covenants and the Ordinance, existing at law or equity. No delay or omission to exercise any right or power conferred under the Ordinance or the Declaration or the Covenants will impair any such right or power or will be construed to be a waiver thereof. Notwithstanding the foregoing, nothing contained in the Declaration or the Covenants or in the Ordinance, is intended to confer on the Authority a right to invalidate a Transfer made in violation of the Declaration, or otherwise to cause a forfeiture or reversion of title to the ADU. Any liens filed pursuant to the Ordinance shall not relate back in time, but shall be effective as of the date recorded.

SUCCESSORS, AMENDMENTS, SEVERABILITY, HEADINGS:

The Covenants are binding upon the ADU, upon the Declarant and the Declarant's heirs, successors and assigns, and upon all Transferees of title to the ADU for the applicable Control Periods and shall run with the land. The Covenants cannot be amended, or released, unless by written instrument executed by the Authority until expiration of the Control Periods, except with respect to a foreclosure by an Eligible Lender conducted in accordance with these Covenants and the Ordinance. If any provisions of the Covenants shall be held invalid or unenforceable, such holdings shall not invalidate or make unenforceable any other provision of the Covenants. The headings in the Declaration and the Covenants are for reference purposes only and shall not affect the meaning or interpretation of the terms and conditions thereof.